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DATE: February 27, 2013

TO: Heads of State Agencies and Human Resources Directors

SUBJECT: Changes to FMLA effective March 8, 2013

The U.S. Department of Labor recently issued final regulations implementing the changes made to the Family and Medical Leave Act (FMLA) in the National Defense Authorization Act (NDAA) and the Airline Flight Crew Technical Corrections Act (AFCTCA). The final rule will become effective March 8, 2013. A side by side comparison of current and final regulations is included as an attachment.

If you have any questions regarding the changes, contact the New Orleans District Office of the U.S. Department of Labor, Wage and Hour Division, by calling 1-866-4-USWAGE or (504) 589-6171, or you can visit <http://www.dol.gov/WHD/fmla/index.htm>.

Sincerely,

s/Shannon S. Templett
Director

Wage and Hour Division (WHD)
Side-by-Side Comparison of Current/Final Regulations

Qualifying Exigency Leave (§ 825.126)	
2008 Regulations	2013 Regulations
<p>An eligible employee may take FMLA leave for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter or parent (the covered military member) is on active duty or has been notified of an impending call or order to active duty in support of a contingency operation.</p> <p>Eligible employees may take qualifying exigency leave for any of the following reasons:</p> <p>(1) short notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities.</p> <p>Employees who request qualifying exigency leave to spend time with a military member on Rest and Recuperation leave may take up to five days of leave.</p>	<p>"Covered military member" is now "military member" and includes both members of the National Guard and Reserves and the Regular Armed Forces.</p> <p>"Active duty" is now "covered active duty" and requires deployment to a foreign country.</p> <p>A new qualifying exigency leave category for parental care leave is added. Eligible employees may take leave to care for a military member's parent who is incapable of self-care when the care is necessitated by the member's covered active duty. Such care may include arranging for alternative care, providing care on an immediate need basis, admitting or transferring the parent to a care facility, or attending meetings with staff at a care facility.</p> <p>The amount of time an eligible employee may take for Rest and Recuperation qualifying exigency leave is expanded to a maximum of 15 calendar days.</p>
Military Caregiver Leave (§ 825.127)	
2008 Regulations	2013 Regulations
<p>An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember (a current servicemember) of the Armed Forces, including National Guard and Reserve members, with a serious injury or illness incurred in the line of duty on active duty for which the servicemember is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, may take up to 26 workweeks of FMLA leave to care for the servicemember in a single 12-month period.</p>	<p>The definition of covered servicemember is expanded to include covered veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness.</p> <p>A covered veteran is an individual who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran.</p> <p>The period between enactment of the FY 2010 NDAA on October 28, 2009 and the effective date of the 2013 Final Rule is excluded in the determination of the five-year period for covered veteran status.</p>
Serious Injury or Illness for a Current Servicemember (§ 825.127)	
2008 Regulations	2013 Regulations
<p>A serious injury or illness means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.</p>	<p>The definition of a serious injury or illness for a current servicemember is expanded to included injuries or illnesses that existed before the beginning of the member's active duty and were aggravated by service in the line of duty on active duty in the Armed Forces.</p>
Serious Injury or Illness for a Covered Veteran (§ 825.127)	

2008 Regulations	2013 Regulations
Not applicable.	<p>A serious injury or illness for a covered veteran means an injury or illness that was incurred or aggravated by the member in the line of duty on active duty in the Armed Forces and manifested itself before or after the member became a veteran, and is:</p> <p>(1) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; OR</p> <p>(2) A physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating (VASRD) of 50 percent or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for caregiver leave; OR</p> <p>(3) A physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service or would do so absent treatment; OR</p> <p>(4) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.</p>
Required Information for Certification of a Qualifying Exigency (§ 825.309)	
2008 Regulations	2013 Regulations
<p>Upon an employer's request, an employee must provide a copy of the covered military member's active duty orders to support request for qualifying exigency leave.</p> <p>In addition, upon an employer's request, certification for qualifying exigency leave must be supported by a certification containing the following information: statement or description of appropriate facts regarding the qualifying exigency for which leave is needed; approximate date on which the qualifying exigency commenced or will commence; beginning and end dates for leave to be taken for a single continuous period of time; an estimate of the frequency and duration of the qualifying exigency if leave is needed on a reduced scheduled basis or intermittently; and if the qualifying exigency requires meeting with a third party, the contact information for the third party and description of the purpose of meeting.</p>	<p>The list of required information for certification for qualifying exigency leave for Rest and Recuperation leave is expanded to include a copy of the military member's Rest and Recuperation leave orders, or other documentation issued by the military setting forth the dates of the military member's leave.</p>
Certification of Military Caregiver Leave (§ 825.310)	
2008 Regulations	2013 Regulations
<p>The following healthcare providers may complete a certification for a covered servicemember: (1) U.S. Department of Defense (DOD) health care provider; (2) U.S. Department of Veterans Affairs (VA) health care provider; (3) DOD TRICARE network authorized private</p>	<p>The list of health care providers who are authorized to complete a certification for military caregiver leave for a covered servicemember is expanded to include health care providers, as defined in § 825.125, who are not affiliated with DOD, VA, or TRICARE.</p>

<p>health care provider; (4) DOD non-network TRICARE authorized health care provider.</p> <p>The employer may require that the certification from an authorized health care provider contain the following information:</p> <ul style="list-style-type: none"> (1) the type of healthcare provider; (2) whether the injury or illness was incurred in the line of duty on active duty; (3) approximate date of injury or illness and probable duration; (4) statement or description of appropriate medical facts, including information on whether the injury or illness may render the member medically unfit to perform the duties of his office, grade, rank, or rating, and whether the member is receiving treatment, recuperation or therapy; (5) beginning and ending dates if care is needed for a continuous period of time; (6) whether there is medical necessity for leave on a reduced schedule or intermittent basis, and estimated schedule; and (7) estimate of frequency and duration of intermittent care. <p>The employer may require that the certification for military caregiver leave also contain the following information provided by the employee and/or covered servicemember:</p> <ul style="list-style-type: none"> (1) names and address of the employer, the employee requesting leave, and the name of the covered servicemember; (2) the relationship of employee to the servicemember for whom the employee is requesting leave; (3) whether the servicemember is a current member of the Armed Forces, the servicemember's military branch, rank and unit; (4) whether the servicemember is assigned to a military medical facility as outpatient, or unit established for command and control and the name of the treatment facility or unit; (5) whether the servicemember is on the temporary disability list; (6) a description of care to be provided and an estimate of leave needed to provide care. <p>Second and third opinions are not permitted, but an employer may seek authentication and/or clarification. Recertifications are not permitted.</p>	<p>If an employer requests certification, an employee may submit documentation of enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers as sufficient certification of the covered veteran's serious injury or illness. The documentation is sufficient even if the employee is not the named caregiver on the document.</p> <p>If an employee submits documentation of the servicemember's enrollment in the VA Program of Comprehensive Assistance for Family Caregivers, an employer may require the employee to provide additional information, such as confirmation of the familial relationship to the enrolled servicemember or documentation of the veteran's discharge date and status.</p> <p>The information from the employee or servicemember that must be included for the certification for military caregiver leave is expanded to account for covered veterans. Employers may require the employee to indicate whether the military member is a veteran, the date of separation, and whether the separation was other than dishonorable. The employer may also require that the employee provide documentation confirming this information.</p> <p>Second and third opinions may be required by an employer for military caregiver leave certifications that are completed by health care providers, as defined in § 825.125, who are not affiliated with DOD, VA, or TRICARE.</p>
<p align="center">Employee Eligibility Hours of Service and USERRA (§ 825.110)</p>	
<p>2008 Regulations</p>	<p>2013 Regulations</p>
<p>To be eligible to take FMLA leave, an employee:</p> <ul style="list-style-type: none"> (1) has been employed by the same employer for at least 12 months; (2) has been employed for at least 1250 hours of service during the 12-month period immediately preceding 	<p>The USERRA-protections for employees who miss work due to USERRA-covered military service are clarified: the protections afforded by USERRA extend to all military members (active duty and reserve), and all periods of absence from work due to or necessitated by USERRA-covered service is counted in determining an employee's</p>

commencement of the leave; and (3) is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of the worksite.	eligibility for FMLA leave.
Minimum Increments of Leave (§ 825.205)	
2008 Regulations	2013 Regulations
Defines the minimum increment of FMLA leave to be used when taken intermittently or on a reduced schedule as an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour.	Clarifying language is added that an employer may not require the employee to take more leave than necessary to address the circumstances that precipitated the need for leave, and that FMLA leave may only be counted against an employee's FMLA entitlement for leave taken and not for time that is worked for the employer.
Varying Minimum Increments (§ 825.205)	
2008 Regulations	2013 Regulations
Permits an employer who accounts for leave in varying increments at different times of the day or shift to also account for FMLA leave in varying increments, provided the increment used for FMLA leave is no greater than the smallest increment used for other types of leave during the period in which the FMLA leave is taken.	Clarifying language is added that employers must track FMLA leave using the smallest increment of time used for other forms of leave subject to a one hour maximum.
Physical Impossibility (§ 825.205)	
2008 Regulations	2013 Regulations
Where it is physically impossible for an employee to start or end work mid-way through a shift, the entire period the employee is forced to be absent is counted against the employee's FMLA leave entitlement.	Clarifying language is added noting that the physical impossibility provision is to be applied in only the most limited circumstances, and the employer bears the responsibility to restore the employee to the same or equivalent position as soon as possible.
Employee Eligibility Hours of Service Requirement, Calculation of Leave, and Recordkeeping Relating to Airline Flight Crew Employees	
2008 Regulations	2013 Regulations
Not applicable.	<p>The provisions concerning airline flight crew employees are placed in Subpart H: Special Rules Applicable to Airline Flight Crew Employees (§§ 825.800 - .803).</p> <p>§825.801, Special rules for airline flight crew employees, hours of service requirement. The hours of service criteria will be met if during the previous 12-month period the airline flight crew employee has worked or been paid for not less than 60% of the applicable monthly guarantee and has worked or been paid for not less than 504 hrs (not including commute time, vacation, sick, or medical leave).</p> <p>§ 825.802, Special rules for airline flight crew employees, calculation of leave. An eligible airline flight crew employee is entitled to 72 days for one or more of the FMLA-qualifying reasons other than military caregiver leave and</p>

	<p>156 days for military caregiver leave. Employers must account for FMLA leave for intermittent or reduced schedule leave for airline flight crew employees in an increment no greater than one day.</p> <p>§ 825.803, Special Rules for airline flight crew employees, recordkeeping requirements. Employers of airline flight crew employees must maintain certain records, including any records or documents that specify the applicable monthly guarantee for each category of employee to whom the guarantee applies, including any relevant collective bargaining agreements or employer policy documents that establish the applicable monthly guarantee; as well as records of hours scheduled.</p>
Recordkeeping (§ 825.500)	
2008 Regulations	2013 Regulations
Details the recordkeeping requirements under the FMLA.	The recordkeeping requirements are updated to specify the employer's obligation to comply with the confidentiality requirements of the Genetic Information Non-Discrimination Act (GINA).
Appendices	
2008 Regulations	2013 Regulations
The FMLA optional-use forms and Notice to Employees of Rights Under the FMLA (poster) are provided in the appendices to the regulations.	The FMLA optional-use forms and poster are removed from the regulations and no longer available in the appendices. They are now available on the Wage and Hour Division website, www.dol.gov/whd , as well as at local Wage and Hour district offices.